Supreme Court, U.S.
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No. 96 560

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In The Supreme Court Of The United States

OCTOBER TERM, 1996

ROGER RAE BARRICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

I. Should the Court settle the split between the circuit courts of appeal on the question of whether materiality is an element of the offense described in 18 U.S.C. §287?

II. Should the Court settle the split between the circuit courts of appeal on the question of how to review the error defined by *United States v. Gaudin*, 115 S.Ct. 2310 (1995); *i.e.*, is *Gaudin*-type error (a) structural error, (b) harmless error, or (3) plain error?

LIST OF PARTIES

The parties are the Petitioner, Ronald Rae Barrick, represented here and in the Fifth Circuit by attorney William A. White, 608 West 12th St., Austin, TX 78701, and the Respondent, United States of America, represented by Mr. Richard L. Durbin, Assistant United States Attorney, 601 N.W. Loop 410, Suite 600, San Antonio, TX 78216.

Additional parties in the Fifth Circuit were Antony Michael Upton and Santa Barbara Castle Construction Development Corp. Both parties were represented by Kenneth E. Houp, 2414 Exposition, D-210, Austin, TX 78703.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

RONALD RAE BARRICK,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on July 29, 1996.

1. Opinion Below.

On July 29, 1996, the Fifth Circuit affirmed Mr. Barrick's convictions under 18 U.S.C. §§ 286, 287 and 2, for conspiring to defraud and knowingly submitting false claims for reimbursement of bond premiums to the Air Force on two different construction contracts, and under 18 U.S.C. §§ 1001 and 2 for knowingly and willfully making a false statement of a material fact to the Air Force.

United States v. Upton, ___F.3d ___ (5th Cir. 1996).[1]

2. Statement of Jurisdiction.

Judgment was entered by the Court of Appeals on July 29, 1996. This Court has jurisdiction under 28 U.S.C. §1254(1).

3. Relevant Statutory Provisions.

18 U.S.C. § 287 provides:

> Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or

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[1]A copy of the opinion is attached as Appendix A.

> fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287 (1984).

> **18 U.S.C. § 1001 provides:**
>
> Whoever, in any matter within the jurisdiction or agency of the United States knowingly and willfully falsifies, conceals, or covers up by an trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent, statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001 (1994)

4. Statement of the Case.

Mr. Barrick owned and operated a bond brokerage business, Benefax Surety Corporation ("Benefax"), that provided bonds required under the Miller Act to construction contractors. Benefax was paid a finder's fee from construction contractors for locating individual sureties who would provide and guarantee the payment and performance bonds required by government contracts.

Barrick also owned and operated a related business, United Fidelity and Trust Company ("United Fidelity"), a regulated Texas trust company, that made business loans to contractors who required start up or mobilization funds.

In the summer of 1989, Castle Construction Corp. ("Castle"), a federal government contractor and co-defendant, owned by another co-defendant, Antony Michael Upton, was a low bidder on two fixed price roofing contracts at Vandenburg AFB, CA. Castle contacted Benefax and retained Benefax to provide individual sureties to guarantee the payment and performance bonds on the two contracts.

United Fidelity agreed to loan Castle $100,000 for its' mobilization costs. Castle executed a promissory note, security agreement and UCC-1, and assigned the two construction contracts to United Fidelity as collateral for the loan.

United Fidelity further agreed to wire transfer the

loan proceeds to Castle before negotiating Castle's two checks written to Benefax in payment of the bond costs. Benefax accepted the checks as full payment and issued two paid receipts to Castle. The loan was never funded and the checks were never cashed.

Upton and Castle submitted a request for reimbursement of the bond costs on both contracts under 48 C.F.R. § 52.232-5(g), and attached the paid invoices as evidence that the bond fees had been paid. The government reimbursed the costs. Castle never completed the roofing contracts and the sureties did not honor their contractual commitments.

The sureties admitted that their financial statements provided to the government in support of their guarantee were fraudulent and testified that Barrick had knowledge of that fact.

Barrick was charged with conspiring with the contractor, Castle, to file false claims under 18 U.S.C. §§ 286 and 287, and 2, and with filing false statements under 18 U.S.C. §

1001 and 2.

At the time of trial, the Fifth Circuit had not held that materiality was an element of 18 U.S.C. §287. If it was, however, the parties and the trial court assumed that it was a question of law to be determined by the trial court. The trial court made that determination in this case. On appeal, the Fifth Circuit held that materiality was not an element of Section 287, and affirmed the actions of the trial court.

At the time of trial, the Fifth Circuit had held that materiality was an element of Section 1001, but again considered materiality to be a question of law for the court to decide. Based on that precedent, Barrick did not object to the trial ruling, nor to the court's failure to charge the jury.

When the Supreme Court decided *Gaudin*, which was after Barrick's trial, but before the case was argued on appeal, materiality became a question of fact for the jury to decide. The Fifth Circuit reviewed the error under Section

1001 for plain error, which resulted in the Fifth Circuit exercising its' discretion to affirm the trial court.

5. Reasons for Granting the Writ.

A. The Fifth Circuit Court of Appeals Rendered A Decision in Conflict With The Decisions Of At Least Two Other United States Courts Of Appeal On The Same Questions, Resulting In A Split Among The Circuits.

(1) Conflicting Decisions Under 18 U.S.C. § 287.

The Fourth and Eighth Circuits clearly construe 18 U.S.C. §287 to include materiality as an essential element. *See United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), *United States v. Wells*, 63 F.3d 745, 750 (8th Cir. 1995) [*following United States v. Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980)]. In contrast, the Second, Tenth and Ninth Circuits, like the Fifth Circuit Court of Appeals in this case, have held that materiality is not an element of §287. *See United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984); *United States v. Irwin*, 654 F.2d 671, 681 (10th Cir. 1981), *cert. denied*, 455 F.2d

1016 (1982). The Eleventh Circuit, in a case on point, noted the split between the circuits, but declined to decide the issue. *United States v. White*, 27 F.3d 1531, 1534-35 (11th Cir. 1994).

(2) Conflicting Decisions Under 18 U.S.C. §1001.

In *United States v. Gaudin*, 115 S.Ct. 2310 (1995), this Court held that when materiality is an essential element of the crime charged, the defendant has a constitutional right to have that issue submitted to the jury. *Id.* at 2320. The Circuit Courts, however, have not been uniform in reaching that result.

The Ninth Circuit reached that result in *United States v. Taylor*, 66 F.3d 254 (9th Cir. 1995), as did the Second Circuit in *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995), and the First Circuit in *United States v. Dirico*, 78 F.2d 732 (1st Cir. 1996) and the Fourth Circuit in *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995). All cases were remanded as a result of the *Gaudin* decision.

Other courts, including the Fifth Circuit in this case, would subject *Gaudin* error to a "plain error" analysis and discretionary remand. *See United States v. Randazzo*, 80 F.3d 623 (1st Cir. 1996), and *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996). Both cases were affirmed, notwithstanding the fact that the issue of materiality had been decided by the trial judge, and not by the jury.

B. Whether Materiality Is An Element of 18 U.S.C. §287 Is An Important Question Of Federal Law Which Should Be Settled By This Court.

In *United States v. Gaudin*, 115 S.Ct. 2310 (1995), this Court held that when materiality is an essential element of the crime charged, the defendant has a constitutional right to have that issue submitted to the jury. *Id.* at 2320.

Title 18, Section 287, like 18 U.S.C. §1001 in the *Gaudin* case, is one of many federal statutes that deal with false statements. It is also one of the many federal statutes that does not expressly make materiality an element of the crime charged. Courts have nonetheless read such a

requirement into many, but not all, of the statutes falling in this category.

Title 18 U.S.C. §1006 makes it a criminal offense for a bank officer to make a false entry in a book of the institution. The Fifth Circuit has agreed with the appellants and the government that materiality is an element of a Section 1006 charge. *See United States v. Pettigrew*, 77 F.3d 1500, at 1511 (5th Cir. 1996).

Title 18 U.S.C. §1014 criminalizes false statements made for the purpose of influencing a federally insured bank. The courts have construed it to include a materiality element. *See, e.g. United States v. Lopez*, 71 F.2d 954, 960 (1st Cir. 1995), *United States v. Wells*, 63 F.3d 750-51; *United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994); *United States v. Staniforth*, 971 F.2d 1355, 1357 (10th Cir. 1992); *United States v. Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987).

Title 18 U.S.C. §1015(a) criminalizes false statements made under oath in naturalization proceedings. Numerous

courts have made materiality of the statements an essenial element of that crime. *Bridges v. United States*, 199 F.2d 811, 829 (9th Cir. 1952), *rev'd on other grounds*, 346 U.S. 209 (1953); *United States v Bressi*, 208 F. 369, 371 (D.C. Cir. 1913); *United States v. Laut*, 17 F.R.D. 31, 33 (S.D.N.Y. 1955).

Title 18 U.S.C. §1425(a) makes it an offense to "knowingly procure. . . , contrary to law, the naturalization of any person. . . . " The Ninth Circuit has construed "contrary to law" to require that materiality of misrepresentations which resulted in procurement be proven as an essential element of the crime. *United States v. Puerta*, 982 F.2d 1297, 1301 (9th Cir. 1992).

Title 18 U.S.C. §152 criminalizes false statements in bankruptcy proceedings. The courts have consistently implied materiality as an essential element of Section 152 offenses. *See United States v. Keys*, 859 F.2d 1257, 1261 (7th Cir. 1988)("Although Section 152 does not expressly include materiality as an element of the offense, we have

construed this section to require that a false oath be given in relation to some material matter."); *United States v. O'Donnell*, 539 F.2d 1233, 1237 (9th Cir.), *cert. denied*, 429 U.S. 960 (1976); *Meer v. United States*, 235 F.2d 65, 67 (10th Cir. 1956)(same).

Finally, a conflict still exists regarding materiality in 18 U.S.C. §1001. The statute explicitly makes materiality an element of the first clause of Section 1001, but not the second. A conflict exists among the courts of appeal over whether materiality is an element of the offense created by the second clause. *Compare United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1980)("While materiality is not an explicit requirement of the second, false statement, clause of Section 1001, courts have inferred a judge-made limitation of materiality in order to exclude trifles from its coverage.") *with Elkin*, 731 F.2d at 1009 ("It is settled in this circuit that materiality is not an element of the offense of making a false statement in violation of Section 1001.")

This Court should examine 18 U.S.C. §287 and decide whether materiality is an element of the offense. By doing so, it will not only settle a question dividing the courts of appeal, but it will also provide valuable guidance to the lower courts in determining whether materiality is an element of other false statement statutes.

C. How the Circuit Courts Are to Review the Error Defined By *United States v. Gaudin*, 115 S.Ct. 2310 (1995) Is An Important Question of Federal Law Which Should Be Settled By This Court.

In *United States v. Gaudin*, 115 S.Ct. 2310, the Court held that when materiality is an element of a crime charged, the defendant has a constitutional right to have that issue submitted to the jury. *Id.* at 2320. In *Gaudin*, the defendant was charged with making material false statements on loan documents in violation of 18 U.S.C. §1001. This case also involves a Section 1001 charge.

The plain language of the *Gaudin* decision makes the application of that decision appear obvious. It is not. The

circuit courts have reviewed *Gaudin* error using three different standards of review, as described below, leading to opposite results.

1. The *Gaudin* Error Is Structural.

The Ninth Circuit found the error to be structural in *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995). The Second Circuit made the same finding in *United States v. Ali*, 68 F.3d 1468, 1474 (2d Dir. 1995), even though "materiality" was not considered to be an element of a Section 1001 violation in that circuit, and even though the defendant did not raise the issue of materiality at trial and did not request a jury instruction.

Circuit courts that base their review on the structural error standard look no further than the *Gaudin* decision. But, *see also United States v. Waldron*, 116 S.Ct. 2078 (1995).

2. The *Gaudin* Error Is Harmless.

The government has often argued that *Gaudin* error is

harmless, forcing some circuit courts to address that issue. Both the First and Fourth Circuits have rejected the argument and found the error to be structural. *See United States v. Dirico*, 78 F.3d 732, 735 (1st Cir. 1996) and *United States v. Johnson*, 71 F.3d 139, 142 (4th Cir. 1995).

The harmless error standard of review gives consideration to *Chapman v. California*, 386 U.S. 18 (1967) (Some constitutional error may be harmless), and *Sullivan v. Louisianna*, 113 S.Ct. 2078 (1993)(Some constitutional errors are of such a fundamental nature as to always invalidate a conviction), and the Fifth (due process clause) and Sixth (right to jury trial) Amendments. The conclusion reached is that because of the *Gaudin* error at the trial court level, there was no jury verdict within the meaning of the Sixth Amendment upon which a *Chapman* review can operate. Thus, the harmless error argument is rejected and the error is determined to be structural.

3. The *Gaudin* Error Is Subject To A Plain Error Standard of Review.

The third approach used to review *Gaudin* error is to subject the error to a plain error analysis as explained by *United States v. Olano*, 113 S.Ct. 1770, 1776 (1993).

In addition to the Fifth Circuit in this case, the First Circuit[2] adopted the plain error rule in *United States v.*

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[2]Both the Fifth Circuit and the First Circuit also have decisions reviewing *Gaudin* error using the harmless error approach, which, in all cases, concludes with a determination that the error is structural, and the cases are remanded. *See United States v. Pettigrew*, 77 F.3d 1500, 1510 (5th Cir. 1996) and *United States v. Dirico*, 78 F.3d 732, 735 (5th Cir. 1996). The distinction between harmless error review and plain error review hinges upon whether the defendant preserved the error at the time of trial. The distinction holds even if, as in this case, it was well settled in the Fifth Circuit that materiality was a question of law for the court, and there was no reason to preserve the error. In such a case, a plain error analysis ensues, and the court exercises discretionary remand, even though plain error has been established. *Pettigrew* and *Dirico* were remanded following the harmless error review, while this case and *Randazzo* were affirmed following the plain error review.

Randazzo, 80 F.3d 623, 630 (1st Cir. 1996), as did the Eleventh Circuit in *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996). Under this rule, it is not sufficient that the defendant establish plain error, which is often conceded by the court, because the court retains descretion to correct, or not correct, the error in any event. In doing so, the court subsutitutes its' discretion, on the effect of the error, for the discretion of the trial court on the issue of materiality. The result is the same. The element of materiality never reaches the jury. Pre-*Gaudin* law remains unchanged. The Fifth and Sixth Amendments, and the plain language of *Gaudin*, are overlooked.

6. Conclusion.

A. With Regard to 18 U.S.C. §287.

In light of the recent *Gaudin* decision, the federal courts need guidance concerning the materiality element of the numerous false statement statutes that seemingly require materiality by implication. With particular respect to 18

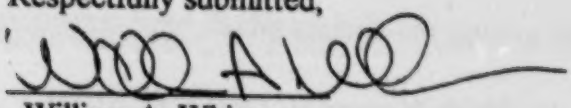
U.S.C. §287, a decision by this Court is needed to resolve the split among the circuits which have considered the question.

B. With Regard to 18 U.S.C. §1001.

The federal courts need guidance on how they are to review the error defined by *Gaudin*. Presently, *Gaudin*-type error is reviewed using three separate standards. Structural error review results in remand. Harmless error review results in remand. Plain error review may or may not result in remand, depending upon the discretion of the reviewing court.

The plain language of *Gaudin* seems obvious. *Gaudin* error is structural error. Harmless error and plain error review can only take place after a jury verdict is returned with all due regard for the Fifth and Sixth Amendments to the Constitution.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-50206

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTONY MICHAEL UPTON,
SANTA BARBARA CASTLE DEVELOPMENT CORP.,
a/k/a Castle Construction Corp., and
RONALD R. BARRICK,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas

Before GARWOOD, DAVIS, and DeMOSS, Circuit Judges.

DEMOSS, Circuit Judge:

Ronald Barrick, Antony Upton and Santa Barbara Castle Development Corporation, a/k/a Castle Construction Corporation, were convicted on numerous counts of

conspiring to defraud the United States Air Force in violation of 18 U.S.C. §286, and for submitting false claims and making false statements to the Air Force for reimbursement of bond premiums in violation of 18 U.S.C. §§ 287 and 2. Barrick was also convicted on three additional counts of making, or causing to be made, a fraudulent statement of material fact to the Air Force in violation of 18 U.S.C. §§ 1001 and 2. The district court sentenced Barrick to 63 months imprisonment, three years supervised release, and ordered Barrick to pay restitution of $1,804,879.99. The district court sentenced Upton to 24 months imprisonment, three years supervised release and ordered Upton to pay $363,813.69 in restitution. Castle Construction, the corporate defendant, was sentenced to five years probation and ordered to pay $363,813.69 in restitution. On appeal, Barrick, Upton and Castle Construction challenge their respective convictions and sentences. We affirm in part and vacate and remand in part.

I. Background and Procedural History

Retired United States Air Force Colonel Ronald Barrick, a practicing lawyer prior to these proceedings, owned Benefax Surety Corporation (Benefax) and United Fidelity and Trust Company (United Fidelity). Benefax, a Texas corporation, operated as a small surety bond brokerage business and received finders fees from construction contractors for locating individual sureties who would provide and guarantee the payment and performance bonds required by government contractors. The corporation had two full-time employees and two part-time employees. Roland Maness, a certified public account, and Pamela McDaniels, a licensed bonding agent and office manager, worked full-time. Two students, Susan Frericks and Christine McDaniels, provided part-time help. Barrick's other business, United Fidelity, a regulated Texas trust company, made business loans to contractors who required start up or mobilization funding.

Barrick's co-defendant, Antony Michael Upton, owned a small construction company, Santa Barbara Castle Development Corporation a/k/a Castle Construction (Castle). Castle built roofs for small residential and commercial buildings.

In the summer of 1989, Vandenburg Air Force Base in California sought fixed price bids from civilian contracors on two roofing contracts. Castle submitted a successful bid on Air Force contracts, No. FO4684-89-C-0047 and FO4684-89-C-0052 (hereinafter No. 47 and No. 52). The Miller Act, 40 U.S.C. §270(a), required Castle to provide both a performance bond and a payment bond after its successful bid.[1]

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[1]The Miller Act provides,in pertinent part:

> Before any contract, exceeding $25,000 in amount, for the construction, alternation,for repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become

binding upon the award of the contract to such person, who is hereinafter designated as "contractor".

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and materials in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

40 U.S.C. § 270a(a)(1986). The Miller Act was amended in 1994 to eliminate the requirement that the construction contract exceed $25,000. *See* 40 U. S. C.

Castle then contacted Benefax and retained it to provide individual sureties to guarantee the payent and performance bonds. Benefax retained Martin H. McGuffin and Terry L. Kinser as individual sureties for the contracts. To be properly accepted as guarantors of these bonds, McGuffin and Kinser submitted notarized Affidavits of Individual Surety (AIS).[2] McGuffin's AIS represented his net worth as $3,782,677, while Kinser's AIS stated a net worth of $7,417,193. Trial testimony revealed that McGuffin signed blank performance and payment bonds and the information was completed later. McGuffin also admitted that the signature on one of the AISs was not his. McGuffin

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§270a(a) (Supp. 1996).

[2]An AIS states the assets and liabilities of the individual surety and the resulting net worth that the surety holds to guarantee. A bank officer or officer of the court must also sign a Certificate of Sufficiency located on the back of the AIS. This certificate represents that the signer is aware of surety's assets and that the AIS accurately represents the financial position of the surety.

testified that he told Barrick that he was having financial difficulties and the bank would not sign the Certificate of Sufficiency. Barrick told him not to worry and then signed the Certifidate of Sufficiency as the President of United Fidelity.

Apparently, Kinser's AIS also reflect an inflated an net worth. Kinser testified that the AIS showed an inflated net worth because Barrick raised it to $5,000,000 on the AIS and then raised it again to over $7,000,000.[3] Later, the Air Force contract officers approved the AISs based on the information provided by the sureties and guaranteed by the signatures on the Certificates of Sufficiency.[4]

Castle issued two checks to Benefax in payment of the

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[3]A Senior Vice President of Glendale Federal Savings Bank signed the Certificate of Sufficiency for Kinser's AIS.

[4]At the time that these contracts were awarded, the federal contract officers were not required to perform independent investigations into the financial solvency of sureties or the validity of an AIS.

bond fees, but asked Barrick not to cash the checks until Castle obtained either a bank loan, a loan from United Fidelity, or until Castle received its first construction and bond reimbursement from the Air Force roofing job. Castle sought outside financing for the mobilization and bond fee costs but was unsuccessful. Consequently, Castle had no mobilization money and could not start the Air Force roofing job nor could it pay for the payment and performance bonds.

Barrick, through United Fidelity, apparently agreed to loan Castle $100,000 for its mobilization costs. Because Castle had no funding, Barrick also agreed to wire transfer the loan proceeds before negotiating Castle's two checks written to Benefax for payment of the bond costs. Barrick gave Upton paid receipts for the Air Force roofing job's payment and performance bonds and held Castle's two checks for these bonds.

Contractors are generally paid for their work and materials on a monthly basis by submitting a progress

payment claim. *See* 48 C.F.R. § 52.232-5(b). Furthermore, the Federal Acquisition Regulations provide that the government shall, upon request, reimburse the contractor for the cost of the payment and performance bonds upon furnishing the government evidence that the sureties received full payment. 48 C.F.R. § 52.232-5(g).

Upton and Castle submitted to the government a request for reimbursement of the bond costs on both contracts. As evidence that the bonds had been paid, Upton attached the paid invoices from Benefax. These invoices showed that Benefax had received $27,047.40 from Castle for Contract 47 and $12,793 for Contract 52 and that Castle owed nothing on the bonds. The Air Force then issued checks of $27,047.40 and $12,793 to "reimburse" the payment of these premiums or bond costs. Castle never completed the roofing jobs and the sureties did not honor their contractual commitments.

The Grand Jury returned an eight count indictment.

Counts one through four charged Barrick, Upton, Castle Construction, and Benefax Surety Corporation[5] with conspiracy to defraud and knowingly submitting false claims to the Air Force on two different construction contracts in violaion of 18 U.S.C. §§ 286, 287 and 2. Count five charged Barrick, Benefax, and Susan K. Frericks a/k/a Susan K. Barrick[6] with knowingly and wilfully making false statements to the Air Force in violation of 18 U.S.C. §§ 1001 and 2. Counts six and seven charged Barrick, Benefax and Roland Aaron Maness[7] with knowingly and wilfully making false statements to the Air Force in violation of 18 U.S.C. §§ 1001 and 2. Count eight charged Benefax and Maness with presenting a falsely made, forged or counterfeit writing to the

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[5]Benefax did not appeal its conviction.
[6]Susan K. Frericks a/k/a Susan K. Barrick pled guilty to a misdemeanor for her role in improperly notarizing the surety's affidavit for Contract 52. She notarized the affidavit without being in the presence of the surety, McGuggin.
[7]The jury found Roland Aaron Maness not guilty on all charged counts.

Air Force in violation of 18 U.S.C. §§ 494 and 2. The jury found Barrick, Upton, and Castle guilty on all charged counts. Barrick, Upton, and Castle filed timely appeals to their convictions and sentences.

II. Discussion

A. *Sufficiency of the Evidence*

Barrick, Upton and Castle Construction contend that the evidence was insufficient to support their convictions for conspiracy and submitting false claims to the Air Force in violation of 18 U.S.C. §§ 286, 287 and 2. As a general rule we owe great deference to the jury's verdict. *United States v. Walters*, 1996 WL 350701, *4 (5th Cir. 1996). We review a defendant's claim that evidence was insufficient to support a verdict in the light most favorable to that verdict and we will affirm the conviction "'if a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt.'" *United States v.*

Schuchmann, 84 F.3d 752, 754 (5th Cir. 1996) (quoting *United States v. Castro*, 15 F.3d 417, 419 (5th Cir.), *cert. denied*, 115 S.Ct. 127 (1994)).

In order to sustain a conviction under the substantive count for filing false, fictitious or fraudulent claimess to the United States under 19 U.S.C. § 287, the government must prove: "(1) that the defendant presented a false or fraudulent claim against the United States; (2) that the claim was presented to an agency of the United States; and (3) that the defendant knew that the claim was false or fraudulent." *United States v. Okoronkwo*, 46 F.3d 426, 430 (5th Cir., *cert. denied*, 116 S.Ct. 1107 (1995). To sustain the conspiracy part of this conviction under 18 U.S.C. § 286, the government must prove: "(1) that there was a conspiracy to defraud the United States; (2) that the defendant knew of the conspiracy and intended to join it; and (3) that the defendant voluntarily participated in the conspiray." *Id.*

In this case, the record shows that ample evidence

exists to support appellants' convictions. Appellants do not contest the first two prongs of their § 287 conviction, i.e., that a false claim was submitted, and that the claim was presented to an agency of the United States. Appellants argue that they did not know that the claim was false or fraudulent. Their contention rests on the alleged ambiguity of the term "payment" as it relates to the payment and performance bonds under the Federal Acquisition Regulations (FARs), 48 C.F.R. § 52.232-5 (1986).

Section 52.232-5(g) states: "In making these progress payments, the Government shall, uon request, reimburse the Contractor for the amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment to the surety." 48 C.F.R. § 52.232-5(g). Appellants contend that on December 4, 1989, Benefax agreed to accept the two checks from Castle in full payment for the Miller Act bonds. Appellants then

agreed that Benefax would not negotiate these checks until Upton obtained outside financing. Because the parties allegedly believed that Castle's writing of these checks constituted payment for the bonds, Castle then submitted claims to the Air Force for reimbursement of the bond costs.

Appellants argue that the language of the Federal Acquisitiion Regulations is ambiguous in that § 52.232-5(g) requires a contractor to furnish evidence of full "payment" to the surety and does not require the contractor to have "incurred the cost" of the bond. We disagree. The plain language of §52.232-5(g) provides for the reimbursement of bond premiums. Reimbursement necessarily implies that something has been paid which requires compensation for money spent.[8]

Furthermore, sufficient evidence exists upon which a

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[8]Webster's defines "reimburse" as "1. to repay; 2. to pay back or compensate (a Person) for money spent or for losses or camages incurred." Webster's II New Riverside University Dictionary 991 (1984).

rational trier of fact could have found that appellants never planned on cashing these checks and that their "good faith" misunderstanding of the Federal Acquisition Regulation was, in reality, a scheme to defraud the government. Upton faxed a letter dated October 5, 1989, to Benefax stating that per their "agreement," Castle's first priority was to pay Benefax for the bond premiums from Contracts 47 and 52 through use of the first draw from the Air Force. The first draw was to cover Castle's bonding and mobilization costs. Upton also signed a note to Barrrick which referred to their "agreement" and asked Barrick not to deposit the checks until there was a complete wire transfer of funds. In the note, Upton also asked for a "paid in full" invoice to bill the Air Force. Further, the government elicited evidence of Upton's bookkeeping tactics. Upton listed the bond checks as non-debits, essentially acknowledging that those checks would not be cashed. Upton also explained to one of the sureties, Kinser, that he could not pay for the bonds before

the job started but that he would get the money from draws against the Air Force and then repay Benefax who would then pay Kinser. Barrick also told Kinser that he would have to wait until Upton received his first draw from the Air Force to receive payment for the bond. Barrick admitted to agent Eddingfield that, in his business, contractors obtained bonds with the understanding that the checks for the bonds woud not be negotiated until the contractor recovered draws from the job.

Testimony from M. Lee Shaffer, a special agent with the Air Force Office of Special Investigations, and Kim Taylor, Castle's office manager/bookkeeper, revealed that Upton never intended for the bond payment checks to be cashed. Upton, in fact, fired Taylor for asking questions about the bookkeeping surrounding these checks and why the checks were recorded as zero debit transactions. Ellen Neal, an accountant hired by Upton in February 1990, also questioned certain record-keeping practices by Upton and

was terminated. Based on these facts, the jury did not have to accept the contentions of Barrick and Upton that there were no false claims on the reimbursement of Contracts 47 and 52 because Upton presented checks to Benefax for the payment of the bond fees.

Even though these checks were never cashed, appellants contend that the paid-in-full invoices were not false and Barrick and Upton did not intend to defraud the government by seeking reimbursement. However, ample evidence suggests that Barrick did engage in a scheme whereby under-funded contractors, such as Upton, could obtain construction contracts and improperly obtain "loans" from the government for the bond fees. This scheme permitted under-funded construction companies to receive contract jobs that they were unable to financially support. Therefore, considering the evidence in a light most favorable to the jury verdict and affording the government all reasonable inferences and credibility choices, we hold that the

government presented sufficient evidence to show that Barrick, Upton, and Castle knew that the reimbursement claims submitted to the Air Force for the two contract bonds were false claims. Based on the facts in this record, a jury could reasonably conclude that appellants engaged in a conspiracy to defraud the Air Force by seeking reimbursement for these false claims.

B. Jury Instructions

Next, appellants contend that the district court erred in refusing to charge the jury on "good faith" and "ambiguity."[9] "We afford the district court substantial latitutde in formulating the jury instructions and review a district court's

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[9]Barrick also contends that the district court erred in failing to submit "willfully" to the jury as to the aiding and abetting counts, 18 U.S.C. §2. The district court's instructions followed the Fifth Circuit's pattern instructions for these counts and were correct statements of the law. Therefore, we find no error with the district court's instructions as to 18 U.S.C. §2.

refusal to give a requested instruction for abuse of discretion." *United States v. Smithson*, 49 F.3d 138, 142 (5th Cir. 1995) (citing *United States v. Chaney*, 964 F.2d 437, 444 (5th Cir. 1992)). To successfully challenge the district court's refusal to include a requested instruction, the appellants must show that their instruction "(1) was a corrct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense." *Id.*

Appellants objected to the district court's refusal to include "good faith" and "ambiguity" in the jury instructions and now argue that the district court's failure to give these instructions seriously impaired their ability to present a "good faith" defense. We disagree. This Circuit permits a district court to refuse to submit an instruction regarding a good faith defense if the defense "is substantially covered by the charge

given and the defendant has had the opportunity to argue good faith to the jury." *United States v. Giraldi*, 1996 WL 339177, *8 (5th Cir. 1996); and *see United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1798 (1995). Both Barrick and Upton presented testimony and evidence in support of their good faith belief or understanding that the bond fees had been paid by Castle Construction's checks. Appellants were permitted to argue that, based on this belief, they never intended to defraud the government.

The good faith defense was also substantially covered by the charge. The district court instructed the jury on "knowingly" and "willfully." The jury was instructed that "knowingly" "means that the act was done voluntarily and intentionally and not because of mistake or accident." "Willfully" or "willingly" was defined to "mean that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids - that is to say, with

bad purpose either to disobey or disregard the law." Appellants' good faith defense was substantially covered by the charge given and was argued to the jury. As such, we hold that the district court did not abuse its discretion by charging the jury in this manner.

Appellants also argue that the district court erred in failing to instruct the jury on "ambiguity" as it relates to the term "payment" under the Federal Acquisition Regulations § 52.232-5(g) because "payment" is not defined by the regulations.[10] The district court refused to allow the jury to decide the meaning of "payment" in § 52.232-5(g). The

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[10]Barrick also contends that the district court erred in denying his motion for judgment of acquittal based on evidence that "payment" is an ambiguous term. Barrick fails to cite to authority or present record references in support of his contention. We decline to reach the merits of this argument because claims made without citation to authority or references to the record are considered abandoned on appeal. *United States v. Ballard*, 779 F.2d 287, 295 (5th Cir.), *cert. denied*, 475 U.S. 1109 (1986).

district court stated: "It borders on the absurd to give an instruction to the jury as to -- they determine regulations and statutes ambiguous. This was either a false claim or not. The government's position is far more plausible than (appellants), and that is that I should determine, as a matter of law, payment, and then just submit the issue."

We hold that the district court correctly refused to allow the jury to interpret § 52.232-5(g). *See United States v. Vidaure*, 861 F.2d 1337, 1340 (5th Cir. 1988), *cert. denied*, 489 U.S. 1088 (1989). In *Vidaure*, we affirmed a district court's refusal to instruct the jury on whether aggravated robbery met the statutory definition of the term "violent felony" under 18 U.S.C. § 924 because the answer did not depend on probative value of the evidence but instead depended on an interpretation of the statute. *Id.* Similarly, the district court in this case refused to submit an instruction on the term "ambiguity" as it relates to the term "payment" under the Federal Acquisition Regulations because the

definitiion of the term "payment" depends on an interpretation of the statute and, as such, is a question of law for the court to decide. *Id.* For the foregoing reasons, we agree that the definition of the term "payment" under § 52.232-5(g) is a matter of statutory interpretation and was correctly decided by the court as a matter of law.

C. *Materiality as an Element of 18 U.S.C. § 287*

Barrick maintains that *United States v. Gaudin*, 115 S.Ct. 2310, 2320 (1995), which required the jury to determine materiality under 18 U.S.C. § 1001, also applies to § 287. Barrick argues that the district court commited plain error by failing to submit the question of materiality under § 287 to the jury. This court has not expressly addressed whether materiality is an element of § 287. *See United States v. Haynie*, 568 F.2d 1091, 1092 (5th Cir. 1978)("[T]he issue of whether materiality is an element of a section 287 charge has not been squarely presented to and decided by this

court."). In *Haynie*, we concluded without deciding that, if materiality is an element of § 287, "the issue is one for the trial judge to handle as a question of law." *id.*; and *see United States v. White*, 27 F.3d 1531, 1534 (11th Cir. 1994) (quoting same)(holding that it is unnecessary to determine whether materiality is an element under § 287 because the forged signatures are material as a matter of law.[11]

After *Gaudin*, materiality is considered a question of fact for the jury to decide. *Gaudin*, 115 S.Ct. at 2313-2320. Therefore, first we must determine whether materiality is an element of § 287 and, if so, we must then ascertain whether the district court committed plain error by failing to submit the question of materiality to the jury. Four Circuit Courts have addressed this issue reaching two different conclusions.[12] *Compare United States v. Wells*, 63 F.3d

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[11]Although we find the Eleventh Circuit's decision in *White* instructive, we are compelled to reach the issue of whether materiality is an element of § 287 after the Supreme Court's decision in *Gaudin*.

[12]We acknowledge that the Supreme Court

745, 750 (8th Cir. 1995) (holding that materiality is an essential element of a § 287 charge), *cert. granted*, 116 S.Ct. 1540 (1996), and *United States v. Snider*, 502 F.2d 645, 652 n. 12 (4th Cir. 1974)(same) with *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995) (holding that while § 1001 expressly makes materiality an element of the offense, § 287 does not and *Gaudin* does not apply to a § 287 conviction), *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992)

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[12]We acknowledge that the Supreme Court has granted certiorari in *United States v. Wells*, 116 S.Ct. 1540 (1996), on the issue of whether materiality is an element of 18 U.S.C. 1014, the crime of making false statements for the purpose of influencing a federally insured banking institution. As in 18 U.S.C. § 287, materiality is not explicitly included in the definition in § 1041. Therefore, the Supreme Court's decision in *Wells* may influence this case and others that have wrestled with the scope of *Gaudin's* holding concerning materiality. However, we do not believe that the decision in this case should be stayed pending the Supreme Court's decision in *Wells*.

(holding that materiality is not an element required by § 287) and *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984) (same), *cert. denied*, 469 U.S. 822 (1984).

In making our own determination of whether materiality is an element of § 287, we look to the plain language of the statute. Section 287 states:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287 (Supp. 1995). The plain language of this provision in no way suggests that materiality is an element of the offense. "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 604 (1991) (citations omitted). The plain language of a statute must be followed unless the

language is "so bizarre that Congress could not have intended it." *Id.* at 191, 111 S.Ct. 604. We therefore agree with our sister Circuits' decisions in *Taylor*, 66 F.3d at 255, *Parsons*, 967 F.2d at 455, and *Elkin*, 731 F.2d at 1009, and hold that materiality is not an element of 18 U.S.C. § 287. *Accord United States v. Irwin*, 654 F.2d 671, 682 (10th Cir. 1981) (the legislative history of § 287 does not indicate that Congress intended to make materiality an element of the statute), *cert. denied*, 455 U.S. 1016 (1982). Because we hold that materiality is not an element of § 287, Barrick's argument that the district court committed error by not submitting the question of materiality to the jury fails.

D. Materiality as an Element of 18 U.S.C. § 1001

The jury found Barrick guilty of counts five, six and seven for making false statements in violation of 18 U.S.C. § 1001. Prior to *Ray v. United States*, 481 U.S. 736, 737, 107 S.Ct. 2093, 2093-94 (1987), once a defendant's conviction on a single count has been sustained, it was not necessary for

the appellate court to reach the merits of the other counts. *See, e.g., United States v. Strickland*, 509 F.2d 273 (5th Cir. 1975) (explaining the concurrent sentence doctrine). However, under *Ray*, the district court's $50 assessment for each count serves as a collateral consequence of those convictions and, in this case, forces us to consider Barrick's remaining arguments. *Ray*, 481 U.S. at 737, 107 S.Ct. at 2093-94.

At the time of trial, this circuit had held that materiality was an element of § 1001, but it was considered a question of law for the court to decide. *United States v. Hausmann*, 711 F.2d 615, 617 (5th Cir. 1983). Based on this prior precedent, Barrick did not object to district court's failure to charge the jury on materiality. When the Supreme Court decided *Gaudin*, which was after Barrick's trial but before the case was argued on appeal, materiality became a question of fact for the jury to decide. *Gaudin*, 115 S.Ct. 2320. We review the district court's failure to charge the jury on the

question of materiality under § 1001 for plain error when a defendant fails to object to the district court's tendered instruction. *United States v. Jobe*, 77 F.3d 1461, 1475 (5th Cir. 1996) (failure to object to a district court's instruction requires a review for plain error).

Under plain error review, the petitioner must show that: (1) error occurred; (2) the error was clear or obvious; and (3) the error affected the petitioner's substantial rights. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing *United States v. Olano*, 113 S.Ct. 1770, 1776-79 (1993), *cert. denied*, 115 S.Ct. 1266 (1995). The Supreme Court has added what amounts to a fourth factor, that is, even if the petitioner establishes these first three factors, a reviewing court "need not exercise its discretion to correct the error unless it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Jobe*, 77 F.3d at 1476 (citing *Olano*, 113 S.Ct. at 1778). Therefore, even if we assume that Barrick has

shown that error occurred; that the error was clear or obvious; and that the error affected the petitioner's substantial rights, we may exercise our discretion to sustain the conviction. *Id.*

After a complete review of the record, we cannot say that the *Gaudin* error affected the fairness, integrity, or public reputation of these judicial proceedings. Consequently, we decline to exercise our discretion to correct the error in Barrick's conviction under § 1001.

E. Restitution: Upton and Castle Construction

Upton and Castle argue that the district court erred in ordering restitution to materialmen and supplier "victims" not named in the indictment.[13] Appellants recognize that

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[13]Barrick did not raise the issue of whether the district court properly ordered restitution on appeal. Consequently, he has waived that issue. *United States v. Miller*, 952 F.2d 866, 874 (5th Cir.), *cert. denied*, 505 U.S. 1220 (1992).

United States v. Pepper, 51 F.3d 469, 473 (5th Cir. 1995), expressly allows for restitution to be ordered for unnamed victims of a crime when the scheme is specifically defined in the indictment. However appellants maintain that, in this case, the "scheme" was limited to obtaining two roofing contracts. They assert that the district court's restitution assessment illogically extends *Pepper* to include restitution for all losses that occurred as a result of their successful bids on the roofing contracts. Appellants maintain that the materialmen and suppliers are not victims of the scheme alleged in the indictment but were merely victims of Castle's failure to complete the roofing jobs.

We agree. "Restitution for victims can only be awarded for the loss caused by the specific offense that is the basis of the offense of conviction. *Pepper*, 51 F.3d at 473 (citing *Hughey v. United States*, 495 U.S. 411, 413, 110 S.Ct. 1979, 1981 (1990)). In the present case, Upton and Castle were convicted of conspiracy to defraud the United

States and of presenting false claims to the United States in violation of 18 U.S.C. §§ 286, 287 and 2. The charges involved the submission of fraudulent reimbursement claims relating to bond fees for two government roofing contracts. Nothing in the indictment suggests that the criminal conduct of fraudulentlly obtaining these contracts caused losses to materialmen and suppliers.

The record shows that Upton and Castle completed 92 percent of contract 47 and 78 percent of contract 52. Uncontroverted evidence supports Upton and Castle Construction's argument that the United States Department of Labor froze all progress payments to Castle on these contracts because of labor union wage disputes with its employees. As a result, Castle walked off the job, but that occurred seven months after it made the fraudulent claims to the Air Force. No evidence suggests that the losses sustained by the materialmen and suppliers were related to the fraudulent claims charged in this indictment. Consequently,

we hold that the district court erred in ordering restitution for the materialmen and suppliers not named in the indictment and vacate the restitution assessments for materialmen and suppliers who suffered losses due to Castle's faillure to complete the roofing jobs.

F. Other Sentencing Issues

1. Obstruction of Justice

Barrick maintains that the district court erred in imposing a two level increase in his offense level for obstruction of justice based on his failure to procure subpoenaed corporate records and his lies to the grand jury that he had produced all relevant records. *See* United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (Nov. 1995). Barrick contends that, during plea negotiations, the government discovered that he had not produced certain records and that he had lied to the grand jury. Because the government gained this information during plea negotiations the production of records and the veracity of his statements

to the grand jury should have been excluded from evidence under FED. R. CRIM P. 11(e)(6)(D)[14] and U.S.S.G. § 1B1.8.[15]

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[14]Rule 11(e)(6)(D) states:

(6) Inadmissibility of Pleas, plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

. . .

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

[15]U.S.S.G. § 1B1.8 states:

(a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

We afford a district court great deference in its application of the sentencing guidelines. *Storm*, 36 F.3d at 1295. A finding of obstruction of justice under § 3C1.1 is a factual finding reviewed for clear error. *Id.* However, we review the district court's interpretation or application of the sentencing guidelines de novo. *United States v. Tedder*, 81 F.3d 549, 550 (5th Cir. 1996). In this case, Barrick erroneously relies on Rule 11(e)(6)(D) for protection from his false testimony before two grand juries. The district court held hearings, heard witnesses, and made extensive findings on Barrick's two level increase in offense level for obstruction of justice. The district court explained:

> Well, the objection with regard to the recommendation of the Probation Department on obstruction of justice is overruled. I find factually that the testimony of Mr. Barrick in the grand jury on Page 11 of Exhibit 11, quote, "[a]nd there is no one else that would have any records to your knowledge that pertain to Benefax? Answer: No, sir. Or, to Fidelity and Surety? Answer: No, sir.
>
> Question: United Fidelity, was that the other

business?

Answer: United Fidelity and Trust Company.

Question: All right, sir. Obviously, what we're trying to establish on this record is that we have obtained all of the records which were sought in the subpoena. And I take it you are willing to assure us that you have complied fully with the subpoena and there are no other records in existence to your knowledge?

Answer: That is correct."

That that [sic] was false testimony as the undisputed evidence establishes clearly that there were mounds of other evidence.

And then again on July 15, 1992, on Page 7 of Exhibit 10, Line 24, "So that your testimony is you have fully complied now with Items Number 3 and 4 and previously fully complied with Items 1 and 2?

That is correct."

Even at that time there were more records available that were delivered.

I also find factually that in llight of the failure to provide these records, which obviously delayed the prosecution of this case and the investigation by the grand jury and the presentation of charges, so that ultimately these cases are what I call stale. We are trying them in 1994 for events that

> occurred years before -- that Mr. -- that one of the results and purposes of Mr. Barrick ultimately was to attempt to negotiate a favorable plea agreement before the Government had all of the financial information and could see the extent and duration of the criminal offenses that were involved in this.
>
> So I will sustain the recommendation of the Probation Department with regard to the obstruction of justice.

Barrick's reliance upon FED. R. CRIM. P. 11(e)(6)(D) to shield him from an increase in offense level for obstruction of justice is misplaced. We have held that Rule 11(e)(6)(D) and FED. R. EVID. 410(4) do not prohibit statements made during plea negotiations to be used during sentencing. *United States v. Paden*, 908 F.2d 1229, 1234-35 (5th Cir. 1990), *cert. denied*, 498 U.S. 1039 (1991); and *see United States v. Medina-Estrada*, 81 F.3d 981, 985-86 (10th Cir. 1996) (holding same). The two rules are virtually identical and deserve the same treatment for purposes of their application to sentencing proceedings. *Id.*; and *see* J. Moore & H. Bendix, MOORE'S FEDERAL PRACTICE §

410.01[1.1] (2d ed. 1981) (suggesting that FED. R. CRIM. P. 11(e)(6)(D) and FED. R. EVID. 410 should be treated the same).

In *Paden*, we also stated that "[a]t sentencing, the district court may rely upon evidence of defendant's credibility and responsibility that is 'sufficiently reliable.'" *Paden*, 908 F.2d at 1225. In the present case, Barrick told the government that he lied to the grand jury about submitting all records requested in the subpoena. The district court correctly found these statements, made by Barrick himself, to be sufficiently reliable and used them at sentencing to increase Barrick's offense level for obstruction of justice. After reviewing the record, we are convinced that the district court committed no error.

Barrick also argues that the district court erred in increasing his offense level for obstructive conduct unrelated to his offense of conviction. Barrick maintains that his false grand jury testimony did not relate to the instant case and, as

such, should not be considered in applying § 3C1.1.

However, the enhancement for obstruction of justice under § 3C1.1 is proper any time the defendant is aware of the action or investigation against him and he conceals or attempts to conceal information material to the investigation, prosecution, or sentencing of the instant offense. *United States v. Lister*, 53 F.3d 66, 71 (5th Cir. 1995). In this case, the obstruction enhancement was based on Barrick's untruthful testimony to the grand jury and his failure to produce all relevant documents ordered by a subpoena. Even if we assume that Barrick's untruthful testimony and failure to produce certain documents were unrelated to the offense of conviction, § 3C1.1 does not require the obstructive conduct to be directly related to the offense of conviction. *Id.* A sufficient nexus appears here. For these reasons, we hold that the district court did not err in increasing Barrick's offense level for obstruction of justice under U.S.S.G. § 3C1.1.[16]

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[16]Because we find no error in the district court's application or findings

2. "Organizer" of Criminal Activity

Barrick contends that the district court erred in determining that he was a "leader" or "organizer" under U.S.S.G. § 3B1.1 and, therefore, subject to a four level increase in offense level. We review a district court's finding that a defendant was a "leader" or "organizer" for clear error. *United States v. Gaytan*, 74 F.3d 545, 561 (5th Cir. 1996).

Barrick's argument appears to focus on his contention that he was not a "leader" and that his organizational role in this offense merely characterized him as a "middleman," not subject to the four level enhancement. We find this argument unpersuasive. The district court clearly identified Barrick as an "leader" or "organizer" under the guidelines. The court stated:

> [A]s far organizers, I've got Mr. Barrick's daughter. The office manager had to know what was going. [sic] Mr. Maness, even

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concerning U.S.S.G. § 3C1.1, we need not address Barrick's other arguments contesting the obstruction enhancement.

though he was acquitted, was involved. Mr. Upton, Mr. Kinser, Mr. McGuffin, Mr. Singh, Pam McDaniel, who is the office manager; and at least five or six of the other sureties that I've heard in evidence that aren't identified by name in the presentence report, but that I've heard; and two of whom, -- Mr. Kelvington has indicated -- like Mr. Singh, didn't even come close on their assets . . . .

I see the organizer of five persons as a person who, in a criminal activity does organize and use five people for the criminal event, and there is no question that Mr. Barrick did that with regard to the sureties, the presentation of those records to the Government. There are far more than five involved in these criminal activities -- sureties that couldn't cover large overdrafts, much less the millions of dollars that they were on in the individual sureties.

United States Sentencing Guidelines § 3B1.1, comment. (n. 4) lists the following factors for a court to consider in determining whether a defendant acted as a "leader" or "organizer:"

> the exercise of decision making authority, the nature of the participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree or control and authority exercised over others.

After a thorough review of the record, we find it replete with evidence suporting the district court's finding that Barrick meets some, if not all, of these requirements. Therefore, we find no clear error.

CONCLUSION

Barrick's conviction and sentence is AFFIRMED on all counts. Upton and Castle Construction's convictions are AFFIRMED on all counts. Upton and Castle Construction's sentences with respect to restitution are VACATED and REMANDED for recalculation consistent with this opinion. All other sentences are AFFIRMED.

AFFIRMED in part and VACATED and REMANDED in part.

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

(2)

No. 96-560

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROGER RAE BARRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether materiality is an element of the offense of making false, fictitious, or fraudulent claims against the United States, in violation of 18 U.S.C. 287.

2. Whether the court of appeals correctly affirmed petitioner's false statements convictions under the plain error rule, Fed. R. Crim. P. 52(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-42A) is reported at 91 F.3d 677.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1996. The petition for a writ of certiorari was filed on October 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of conspiracy to defraud the United States by obtaining and aiding to obtain the payment of a false claim, in violation of 18 U.S.C.

286 (Counts One and Three), on two counts of presenting a false claim against the United States Air Force, in violation of 18 U.S.C. 287 and 2 (Counts Two and Four), and on three counts of making a false statement of material fact to the Air Force, in violation of 18 U.S.C. 1001 and 2 (Counts Five, Six, and Seven).[1] He was sentenced to 63 months' imprisonment, to be followed by three years' supervised release. He was also ordered to pay $1,804,879.99 in restitution. The court of appeals affirmed. Pet. App. 1A-42A.

1. The evidence at trial showed that petitioner, a retired Air Force colonel and practicing lawyer, owned Benefax Surety Corporation (Benefax) and United Fidelity and Trust Company (United Fidelity). Benefax operated as a small surety bond brokerage business. It received finder's fees from construc-

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[1] Petitioner was charged along with several others. Anthony Michael Upton, Santa Barbara Castle Development Corporation, a/k/a Castle Construction, and Benefax Surety Corporation were also charged in Counts One through Four. Benefax and Susan K. Frericks, a/k/a Susan K. Barrick, were also charged in Count Five; Benefax and Roland Aaron Maness were charged along with petitioner in Counts Six and Seven. Count Eight charged Benefax and Maness with presenting a falsely made, forged, or counterfeit writing to the Air Force, in violation of 18 U.S.C. 494 and 2. Pet. App. 10A-11A.

Upton, Benefax, and Castle Construction were convicted along with petitioner; the jury acquitted Maness on all counts. Susan K. Frericks pleaded guilty to a misdemeanor. Petitioner, Upton, and Castle Construction appealed their convictions, and the court of appeals affirmed on all counts, while remanding the sentences of Upton and Castle Construction for recalculation of the restitution amounts. Pet. App. 10A-11A & nn. 5-7. Neither Upton nor Castle Construction joins in this petition.

tion contractors for locating sureties to provide and guarantee the payment and performance bonds that government contractors required. United Fidelity made business loans to contractors who required start-up or mobilization funding. Pet. App. 3A. Petitioner's co-defendant, Anthony Michael Upton, owned a small construction company, Santa Barbara Castle Development Corporation, a/k/a Castle Construction (Castle), which built roofs for small residential and commercial buildings. *Id.* at 4A.

In the summer of 1989, Castle submitted a successful bid on two Air Force contracts for roofing to be done at Vandenburg Air Force Base. After its bid was accepted, Castle was required by law to provide both a performance bond and a payment bond.[2] Castle retained Benefax to provide individual sureties to guarantee the payment and performance bonds. Benefax in turn retained Martin McGuffin and Terry Kinser as individual sureties for the contracts. Pet. App. 6A.

McGuffin and Kinser submitted notarized Affidavits of Individual Surety (AIS) in support of the performance and payment bonds. McGuffin's AIS represented his net worth as $3,782,677, and Kinser's AIS stated a net worth of $7,417,193. Pet. App. 6A. McGuffin admitted at trial that the signature on one of the affidavits was not his. Both affidavits overrepresented McGuffin's net worth. Gov't C.A. Br. 13-14. McGuffin testified that he told petitioner he was having financial difficulties and that the bank would not sign the Certificate of Sufficiency on the back of

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[2] The Miller Act, 40 U.S.C. 270a, requires that all contractors for federal construction contracts provide performance and payment bonds.

the AIS.[3] Petitioner told McGuffin not to worry and then signed the Certificate of Sufficiency as President of United Fidelity. McGuffin signed blank performance and payment bonds, and the information was completed later. Pet. App. 6A-7A.

Kinser testified that his AIS also showed an inflated net worth: petitioner had raised it to $5 million and then to more than $7 million. Based on the information provided by the sureties and guaranteed by the Certificates of Sufficiency, Air Force contract officers approved each AIS. Pet. App. 7A.

Castle issued two checks to Benefax in payment of the bond fees, but asked petitioner not to cash the checks until Castle obtained a bank loan or other financing. Petitioner, through United Fidelity, agreed to lend Castle $100,000 for its mobilization costs, and agreed to wire transfer the loan proceeds before negotiating Castle's checks to Benefax for the bond fees. Petitioner gave Upton paid receipts for the payment and performance bonds and held Castle's checks for those bonds. Pet. App. 7A-8A.

Upton and Castle submitted a request to the government for reimbursement of the bond costs on both contracts, attaching the paid invoices from Benefax. The invoices showed that Benefax had received $27,047.40 and $12,793 from Castle as payment for the bonds on each contract, and that Castle owed nothing on the bonds. The Air Force issued checks reimbursing Castle for the bond costs. Castle never completed the roofing contracts, and the sureties did

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[3] The certificate represents that the signer (here, a bank officer) is aware of the surety's assets and can state that the AIS accurately represents the surety's financial position. Pet. App. 6A n.2; Gov't C.A. Br. 6-7.

not honor their contractual commitments. Pet. App. 9A.

2. At trial, petitioner did not object to the district court's failure, with respect to all counts charging offenses under 18 U.S.C. 287 and 1001, to submit the issue of materiality to the jury. In accordance with circuit precedent, see *United States* v. *Hausmann*, 711 F.2d 615, 617 (5th Cir. 1983), the court decided that issue itself, holding that petitioner's false claims and statements were material as a matter of law. See Pet. 6. On appeal, petitioner argued that this Court's intervening decision in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), which requires a jury determination of the issue of materiality in a prosecution under 18 U.S.C. 1001, also applies to prosecutions under 18 U.S.C. 287. Petitioner claimed that, with respect to his convictions under both Section 1001 and Section 287, the district court had committed plain error by failing to submit the issue of materiality to the jury.

The court of appeals held that because the plain language of Section 287 "in no way suggests that materiality is an element of the offense," Pet. App. 26A, it is not such an element, and the district court's failure to submit that issue to the jury was therefore not erroneous. *Id.* at 27A. The court observed that the Second, Ninth, and Tenth Circuits had reached the same conclusion. *Ibid.*; see *United States* v. *Taylor*, 66 F.3d 254, 255 (9th Cir. 1995), petition for cert. pending, No. 95-8279 (filed Mar. 15, 1996); *United States* v. *Parsons*, 967 F.2d 452, 455 (10th Cir. 1992); *United States* v. *Elkin*, 731 F.2d 1005, 1009 (2d Cir.), cert. denied, 469 U.S. 822 (1984).

The court of appeals then turned to petitioner's claim that the district court committed plain error by failing to submit the materiality issue to the jury on

the Section 1001 counts. Following *United States* v. *Olano*, 507 U.S. 725 (1993), the court of appeals observed that, before a court may grant relief to a defendant under plain error review, it must find that an error was committed, that it was plain, clear or obvious, that it affected the defendant's substantial rights, and—under the "discretionary" prong of the *Olano* analysis—that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Pet. App. 29A (internal quotation marks omitted). In this case, the court of appeals concluded that, even if petitioner could meet the first three requirements for a finding of plain error, the *Gaudin* error did not "affect[] the fairness, integrity, or public reputation of these judicial proceedings" and therefore did not warrant reversal. *Id.* at 30A.

DISCUSSION

1. Petitioner claims (Pet. 7-13) that materiality is an element of a false claims offense under 18 U.S.C. 287 and that the district court committed plain error by failing to submit that element to the jury. Although we believe that the holding of the court of appeals—that materiality is not an element of Section 287—is correct, the Court should hold the petition pending its decision in *United States* v. *Wells*, No. 95-1228 (argued Nov. 4, 1996).

Section 287 makes it a crime to submit a claim on or against a government agency "knowing such claim to be false, fictitious, or fraudulent." 18 U.S.C. 287. The jury instructions in this case required the jury, in order to convict petitioner on the Section 287 counts, to find beyond a reasonable doubt that petitioner "knowingly presented to an agency of the United States a false or fraudulent claim against the United

States," and that petitioner "knew the claim was false or fraudulent at the time of presentation." C.A. R.E. 94.

Because the text of Section 287 contains no reference to a materiality element, the district court was correct not to instruct the jury that, to convict, it must further find that petitioner's claims were materially false. The court of appeals was likewise correct in upholding petitioner's conviction on the Section 287 counts. As this Court has emphasized, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive.").

The Fifth Circuit's holding on this point is consistent with the decisions of the Second and Tenth Circuits. See *United States* v. *Elkin*, 731 F.2d 1005, 1009-1010 (2d Cir.) ("language of § 287 in no way suggests that materiality is an element of the offense"), cert. denied, 469 U.S. 822 (1984); *United States* v. *Irwin*, 654 F.2d 671, 682 (10th Cir. 1981) (statutory language and legislative history of Section 287 do not indicate that Congress intended that materiality be an element of the offense), cert. denied, 455 U.S. 1016 (1982). Petitioner argues (Pet. 7), however, that that holding conflicts with decisions of the Fourth and Eighth Circuits. Although there is language in Fourth and Eighth Circuit cases to the effect that materiality is an element of a Section 287 offense,

those statements were not necessary to the holdings of those cases, and we are unaware of any case in which a court of appeals has reversed a conviction under Section 287 on materiality grounds.

Petitioner relies on *United States* v. *Snider*, 502 F.2d 645 (1974), in which, in a footnote, the Fourth Circuit cited with approval a district court decision in a separate case holding that materiality is an element of Section 287. See 502 F.2d at 652 n.12. *Snider*, however, involved a prosecution under 26 U.S.C. 7205 (which proscribes willfully supplying false or fraudulent information to an employer regarding tax withholding), not Section 287. Petitioner also relies on the Eighth Circuit's decision in *United States* v. *Wells*, 63 F.3d 745 (1995), cert. granted, 116 S. Ct. 1540 (1996), but that case involves a prosecution under a different statute as well: 18 U.S.C. 1014, which proscribes knowingly making a false statement to a federally insured bank for the purpose of influencing the actions of that bank. The Eighth Circuit's statement in *Wells* that materiality is an element of Section 287, see 63 F.3d at 750, was therefore dictum.

Petitioner also relies on an earlier Eighth Circuit case, *United States* v. *Adler*, 623 F.2d 1287 (1980), that did involve a false claim prosecution brought under Section 287. In *Adler*, however, the parties had not addressed whether materiality was in fact an element of Section 287, and the court accordingly stated that it would "treat materiality as an essential element." 623 F.2d at 1291 n.5. The court affirmed the defendant's convictions, however, on the ground that the false claims in that case were material. *Id.* at 1291-1292. The court's treatment of the broader legal question—whether materiality is in fact an element

of an offense under Section 287—was therefore unnecessary to the court's holding.

In sum, there is no clear conflict among the circuits on the question presented here, and this Court's review is not now warranted to resolve the issue. The Court may wish to hold this petition, however, pending its decision in *United States* v. *Wells*, No. 95-1228 (argued Nov. 4, 1996), which, as noted above, presents the question whether materiality is an element of 18 U.S.C. 1014. The text of Section 1014, like the text of 18 U.S.C. 287, contains no reference to a materiality element, and the Court's decision in *Wells* could therefore bear on the issue whether a materiality element is to be imputed to Section 287.[4]

2. Petitioner also challenges (Pet. 8-9, 13-17) the court of appeals' refusal to reverse his conviction because the district court failed to submit the issue of materiality to the jury on the Section 1001 counts. He asserts a conflict among the circuits on the question whether a *Gaudin* error is subject to plain- or harmless-error review under Fed. R. Crim. P. 52 or whether it instead constitutes "structural" error, which is normally reversible per se. Because the question of the proper standard of review for *Gaudin* errors to which no objection was made at trial is

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[4] The question whether materiality is an element of Section 1014 does not necessarily control the question whether materiality is an element of Section 287, because the two statutes contain different language. Indeed, while the Ninth Circuit has held that materiality is not an element of Section 287, *United States* v. *Taylor*, 66 F.3d 254, 255 (1995), petition for cert. pending, No. 95-8279 (filed Mar. 15, 1996), it has held that materiality is an element of Section 1014, see *United States* v. *Nash*, 76 F.3d 282, 284 (1996).

before this Court in *Johnson* v. *United States*, cert. granted, No. 96-203 (Nov. 15, 1996), the Court should hold this petition pending its decision in *Johnson*.[5]

CONCLUSION

The petition for a writ of certiorari should be held, as to Question 1, pending this Court's decision in *United States* v. *Wells*, No. 95-1228, and, as to Question 2, pending the Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

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DECEMBER 1996

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[5] Petitioner also asserts a circuit conflict on a separate question: whether materiality is an element of all offenses charged under Section 1001. See Pet. 12. Because the court of appeals acted on the premise that materiality is an element of petitioner's Section 1001 offenses, however, that issue is not properly presented in this petition. In any event, there is no conflict on that issue. The Second Circuit, the only court of appeals that petitioner notes had held that materiality is not an element of some offenses under Section 1001, has recently joined the other circuits in holding that materiality is an element of all offenses under Section 1001. See *United States* v. *Ali*, 68 F.3d 1468, 1474-1475 (1995).